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## Congress Sets Its Sights on Patent Demand Letters with New Version of the Targeting Rogue and Opaque Letters (TROL) Act

On July 13, 2018, Congressman Michael Burgess (R-Tex.), Chairman of the House Energy and Commerce Committee's Subcommittee on Health, reintroduced the Targeting Rogue and Opaque Letters ("TROL") Act (H.R. 6370). A version of the TROL Act was originally introduced in 2015 during the 114th Congress, but that version did not receive consideration by the House.

Attorneys  
[Vladimir J. Semendyai](#)

The new version of the TROL Act includes several provisions aimed at cracking down on what are viewed as abusive, patent-related demand letters. In short, it would empower the Federal Trade Commission (FTC) to bring suit against entities who engage in misleading and deceptive practices through the sending of patent infringement demand letters. The bill would also explicitly preempt the many state laws passed in the last several years to target abusive demand letter practices. Given the limited resources of the FTC, however, the bill would also permit state attorneys general to bring suit against demand letter abusers. It would not, however, create any new private right of action against the senders of demand letters.

In introducing this bill, Congressman Burgess stated that "[t]oo often, patent trolls foil good progress with frivolous legal action," and that the TROL Act is necessary to "bolster transparency and accountability to protect legitimate patent holders and stop bad actors." This is in line with his comments on the previous version of the bill that the TROL Act "offers a balanced solution" to the problem of "[t]he misuse of patents as a business strategy," which in his words remains "a massive drag on the economy to the tune of tens of billions of dollars a year."

The TROL Act would make unlawful "certain bad faith communications in connection with the assertion of a United States patent" as "unfair or deceptive acts or practices . . . within the meaning of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)). The bill defines "bad faith" to mean that the sender made false or misleading statements knowingly, with reckless indifference, or with awareness of the high probability of deception. Specifically, the TROL Act would prohibit demand letters when the sender in bad faith asserts that:

- The sender is a person with the right to license or enforce the asserted patent;
- A civil action for infringement has been filed against the recipient;
- A civil action for infringement has been filed against others;
- Legal action for infringement will be taken against the recipient;
- The sender is the exclusive licensee of the asserted patent;
- Others have purchased a license for the asserted patent;
- Others have purchased a license, but fails to identify that it is unrelated to the asserted patent;
- An investigation of the recipient's alleged infringement occurred; or
- The sender previously filed a civil action for infringement based on the same activity identified in the letter, when the sender knew such activity was held to be non-infringing.

The bill would also prohibit seeking compensation in bad faith for:

- A patent that has been held to be unenforceable or invalid in a final determination;
- Recipient's activities after the expiration of the asserted patent; or
- Recipient's activities that the sender knew were authorized by a person with the right to license the patent.

Finally, the bill would prohibit omitting the following information from a demand letter:

- The identity of the person or entity attempting to license to enforce the patent, including all parent entities, unless the person or entity is a public company and is identified;
- The identity of at least one patent alleged to be infringed;
- The identity of at least one allegedly infringing product, service, or activity;
- A description of how the accused products, services, or activities allegedly infringe; or
- Contact information for the person the recipient may contact about the letter's assertions.

If enacted, the TROL Act could have a significant impact on restricting the practice of abusive demand letters. The FTC would be expressly empowered to bring suit and to issue civil penalties, making those who abuse demand letters potentially liable for up to \$5 million for a series of violations of the law. As noted above, the bill would also preempt demand letter-related state laws, in an effort to avoid a patchwork of different solutions to the same problem, and would authorize state attorneys general to bring suit against demand letter abusers within their particular jurisdictions.

The issue of patent infringement demand letters is one that frequently arises on Capitol Hill. Certain provisions overlapping with the TROL Act are included in the [STRONGER Patents Act of 2017](#), which was introduced in the Senate by Senator Christopher A. Coons (D-DE) with three bipartisan co-sponsors and was the subject of a Senate hearing on April 18, 2018. [A House counterpart of the STRONGER Patents Act](#) was introduced in the House of Representatives on March 20, 2018, sponsored by Representatives Steve Stivers (R-OH) and Bill Foster (D-IL). While patent-related issues may take a back seat given that Congress has its hands full with a Supreme Court nomination and the upcoming midterm elections, the issue of patent infringement demand letters remains in Congress's eye. Stay tuned to Capital Insights for the latest in patent-related legislative developments.